

Mag. Judge John T. Rodgers

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON COUNTY

RUSSELL DUANE McNEIL,)	
)	
Petitioner,)	NO. CV-13-3065-JTR
)	
vs.)	JOINT MOTION TO
)	DISMISS WITHOUT
MAGGIE MILLER-STOUT,)	PREJUDICE
)	
Respondent.)	
)	

Russell Duane McNeil, the Petitioner, by and through his attorney, Lenell Nussbaum, and Maggie Miller-Stout, through her counsel, Bob Ferguson, Washington State Attorney General, by and through Assistant Attorney General Alexei A. Kostin, jointly ask this Court to dismiss this § 2254 petition without prejudice.

Mr. McNeil is a Washington State prisoner who is currently serving a mandatory life without the possibility of parole sentence for an aggravated first degree murder that took place when he was under the age of 18. Mr. McNeil filed a Personal Restraint Petition in the Washington State Supreme Court challenging his sentence under *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Mr. McNeil also

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2 filed this § 2254 petition while his personal restraint
3 petition was pending in state court. This petition was stayed
4 pending exhaustion in the Washington state courts of the
5 personal restraint petition.

6 While Mr. McNeil's PRP was pending, the Washington
7 Legislature enacted a statute that established a new procedure
8 for re-sentencing prisoners serving life without parole
9 sentences for an offense committed while under the age of 18.
10 Pursuant to this statute, Mr. McNeil is to be resentenced in
11 the sentencing court, Yakima County Superior Court, where the
12 court will set a minimum sentence between 25 years and life.
13 In light of this new procedure, the Washington Supreme Court
14 dismissed Mr. McNeil's PRP. In re Personal Restraint of
15 McNeil, 181 Wn.2d 582, 334 P.3d 548 (2014); Laws of 2014, ch.
16 130, codified at RCW 10.95.030(3), 10.95.035.

17 In light of this new state statutory procedure and the
18 pendency of a new sentencing hearing in Mr. McNeil's case which
19 will set a minimum sentence, the parties agree:

20 1. Mr. McNeil's petition under 28 U.S.C. § 2254, which
21 challenges the life without parole sentence imposed in Yakima
22 County Superior Court No. 88-1-00428-1, should be dismissed
23 without prejudice;

24 2. In light of RCW 10.95.030(3) and RCW 10.95.035, the
25 original judgment and sentence in that case will be vacated and
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2 a new judgment and sentence will be entered after a re-
3 sentencing hearing;

4 3. The Yakima County Superior Court's setting of a
5 minimum term for Mr. McNeil under RCW 10.95.030(3) and
6 10.95.035 will be considered a new judgment and sentence for
7 purposes of 28 U.S.C. § 2244(b) and 28 U.S.C. § 2244(d)(1);

8 4. Thus, any possible petition for relief under 28
9 U.S.C. § 2254, challenging the new judgment and sentence, will
10 not be successive to the instant § 2254 petition, and the one-
11 year time limit set out in 28 U.S.C. § 2244(d) will begin
12 running from the date that the new judgment is final (applying
13 whatever exceptions or tolling applies under that statute);

14 5. Any possible ex post facto challenges that Mr.
15 McNeil may have to the applications of Laws of 2014, ch. 130,
16 to his case are not ripe for review. If Mr. McNeil raises such
17 challenges in state court, in conjunction with the new
18 sentencing proceedings, he may raise such issues in any federal
19 writ that might be filed in the future.

20 6. Accordingly, the parties request that the Court
21 dismiss this petition without prejudice.

22 Respectfully submitted this 26th day of June, 2019.
23

24 /s/ Lenell Nussbaum
25 LENELL NUSSBAUM, WSBA No. 11140
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/s/ Alex Kostin
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CERTIFICATE OF SERVICE

I, Alexandra Fast, hereby certify that on June 26, 2019, I caused the foregoing document to be filed with the United States District Court's Electronic Case Filing (CM/ECF) system, which will serve one copy of the foregoing document by email on opposing counsel.

I further certify that on June 26, 2019, I caused a copy of the foregoing document to be served in paper format on Mr. Russell Duane McNeil, 957470, P.O. Box 2049, Airway Heights, WA 99011, by depositing the same in the United States Postal Service, postage prepaid; and served a copy on Alex Kostin, Assistant Attorney General, by electronic service at: AlexK@atg.wa.gov.

/s/ Alexandra Fast
ALEXANDRA FAST